receivable to the plaintiff at any agreed price, provided the transfer were a *bona fide* sale.[13] The vendor's agreement to repay any accounts at maturity may be considered in the nature of a guaranty or conditional promise, thus placing the case on an analogy to the negotiable instrument cases mentioned above.[14] The Kellastone Co. was not merely selling its promise to repay the money, but transferring valid existing choses in action with an agreement that they should be paid in case of default by the primary debtors.[15] The court seems to have been in error in regarding the Kellastone Co.'s guaranty of the accounts as such forceful evidence of a loan.[16] Since where there is any doubt of the validity of a contract, it is presumptively valid,[17] and a sale of negotiable instrument with an indorsement may be made in Illinois,[18] the dissenting opinion, written by Chief Justice Farmer, would seem to be preferable. Ultimately, of course, the question is purely one of fact.

RIGHT OF SUBROGATION AS BETWEEN INSURER AND CARRIER.—It is settled law in practically every jurisdiction in this country that, when both the underwriter and some third person become liable to the assured for the loss of his property, he may recover against one or the other, or both, but he may not retain both satisfactions,[1] on the ground that it would be sanctioning gaming contracts to allow the assured to recover twice for the same loss,[2] whereas insurance contracts are legitimate only for the purpose of indemnity against loss.[3] Historically, however, a wager policy is a policy on property in which the assured has no insurable interest, and the presence of such an interest

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[13]Dickson *v.* City of St. Paul (1908) 105 Minn. 165, 117 N. W. 426; see note 7, *supra.*

[14]*Cf.* 1 Daniel, *op. cit.* § 767 *et seq.*; Nichols *v.* Fearson, *supra.*

[15]The Illinois rule is that the note itself is not usurious in the case of a discount at higher than the legal rate of interest, Colehour *v.* State Savings Inst., *supra,* but the indorsee may only recover against the indorser the amount he has advanced. Raplee *v.* Morgan (1840) 3 Ill. 561. This was the rule in Connecticut, New York and Maine. See Belden *v.* Lamb (1846) 17 Conn. 441; Rapelye *v.* Anderson (N. Y. 1842) 4 Hill, 472; Lane *v.* Stewart (1841) 20 Me. 98. This rule has probably been changed by the Negotiable Instruments Law, § 96 [N. Y. § 167]; Norton, Bills & Notes (4th ed.) 316 n.; see also § 116 [N. Y. § 187].

[16]The cases cited by the court in its opinion seem to be distinguishable, in that they all contain absolute agreements to repurchase the accounts in default at maturity.

[17]United States *v.* Central Pac. R. R. (1886) 118 U. S. 235, 6 Sup. Ct. 1038. The Usury Statutes are penal and should be construed strictly. 3 Parsons, *op. cit.* *148.

[18]See note 15, *supra.*

[1]Chicago etc. R. R. *v.* Pullman So. Car. Co. (1891) 139 U. S. 79, 11 Sup. Ct. 490; *cf.* Excelsior Fire Ins. Co. *v.* Royal Ins. Co. (1873) 55 N. Y. 343; Nelson *v.* Bound etc. Fire Ins. Co. (1887) 43 N. J. Eq. 256, 11 Atl. 681.

[2]Honore *v.* Lamar Fire Ins. Co. (1869) 51 Ill. 409; Nelson *v.* Bound etc. Fire Ins. Co., *supra*; see *contra,* King *v.* State etc. Ins. Co. (1851) 61 Mass. 1.

[3]Richards, Insurance (3rd ed.) § 24; see 12 Columbia Law Rev. 631.

is the sole test of the legality of the contract.[4] If the contract is valid in its inception, it is difficult to see how it can subsequently become a gaming contract by the assured's additional recovery on an entirely different claim, based on considerations extraneous to the contract of insurance. And properly speaking, the underwriter and the third person are never liable for the same loss; the liability of the former is based on the damage to the interest insured, that of the latter on his own peculiar relation to the assured—whether as mortgagor, tort feasor, or bailee.[5]

It adds nothing to the strength of the rule to say that, as between the underwriter and the third person, the former is in the position of surety and the latter is principal.[6] The analogy is purely arbitrary; the parties never in fact contemplated such a relation,[7] the entrance of the so-called principal being in the nature of things fortuitous. Obviously this is an addendum after the fact, and not the basis for the fact itself. Regardless, however, of the merits of the analogy, it is followed out, and on paying the insurance, the underwriter is usually subrogated to the rights of the assured against the third person.[8] As in the case of a surety, the right arises only upon payment of the insurance,[9] but the underwriter becomes surety as soon as the loss occurs, and a release thereafter of the third person by the assured discharges the underwriter.[10] On the same principle, a release after

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[4]The statute 19 Geo. II, c. 37 (1746) was the first prohibition on the right to effect insurance on marine risks "interest or no interest". Historically, therefore, contracts of insurance became contracts of indemnity by virtue of requiring the assured to have an insurable interest in the property. See also Richards, *op. cit.* § 24.

[5]In the case of insurance by the mortgagee, the argument was formerly made that the thing insured is the debt, not the property. Insurance Co. *v.* Woodruff (1857) 26 N. J. L. 541; see Carpenter *v.* Providence etc. Ins. Co. (1842) 41 U. S. 495. But this theory has been rejected, though the same conclusion is reached on other grounds. Nelson *v.* Bound etc. Fire Ins. Co., *supra*; Insurance Co. *v.* Stinson (1880) 103 U. S. 25; Excelsior Fire. Ins. Co. *v.* Royal Ins. Co., *supra*. Where the third person is a tort feasor, the relation is even slighter, yet the holding is practically unanimous against two recoveries by the assured. Richards, *op. cit.* § 52. In Massachusetts, where, till the rule was changed by statute, see Tabbutt *v.* Insurance Co. (1904) 185 Mass. 419, 70 N. E. 430, the mortgagee might collect twice, King *v.* State etc. Ins. Co., *supra*; see International Trust Co. *v.* Boardman (1889) 149 Mass. 158, 21 N. E. 239, the victim of a tort might not. Hart *v.* Western R. R. (1847) 54 Mass. 99.

[6]See note 5, *supra*.

[7]Thus a contract of insurance may be in parol, Richards, *op. cit.* §§ 74, 80, whereas a contract of proper suretyship or guaranty may not. The insurer assumes an absolute liability in the first instance, not the conditional liability of a guarantor.

[8]See cases cited in note 1, *supra*; Thomas *v.* Montauk Fire Ins. Co. (N. Y. 1887) 43 Hun. 218 (case of mortgagee); Rintoul *v.* New York Cent. etc. R. R. (C. C. 1884) 20 Fed. 313 (case of carrier).

[9]Insurance Co. *v.* Fidelity etc. Co. (1889) 123 Pa. 523, 16 Atl. 791; United States *v.* American Tobacco Co. (1897) 166 U. S. 468, 17 Sup. Ct. 619.

[10]Dilling *v.* Draemel (1890) 16 Daly 104, 9 N. Y. Supp. 497; see Rintoul *v.* New York Cent. etc. R. R., *supra*.

the underwriter has paid the insurance is void.[11] But the right of subrogation is "a derivative one, and comes solely from the assured, and can only be enforced in his right".[12] Hence the underwriter gets only such rights as the assured himself has; and nothing done by the latter before the insurer's liability arises affects the assured's right to indemnity against the insurer.[13]

The application of these doctrines against a carrier who has become liable to a shipper for loss of or injury to his goods has led to the interesting situation illustrated by the recent case of *The Julia Luckenbach* (2 C. C. A. 1916) 235 Fed. 388. This was an action in admiralty by a shipper against the carrier for the loss of a cargo of sugar, alleged to have been caused by the unseaworthiness of the vessel. The defendants relied on a clause in the bills of lading which gave them, in case of a loss for which they might be liable, the benefit of any insurance effected on the cargo by the shipper,[14] and claimed that the underwriters had paid for the loss. The plaintiff replied that the alleged payments were merely loans, made by the underwriters on condition that the plaintiff proceed against the carrier, in accordance with a term in the policies which declared the contract void in case of shipment under such bills of lading,[15] and which provided further for payment only of the amount not otherwise recoverable by the shipper. The court held for the plaintiffs, on the ground that whether the advances were called loans, gratuities, or anything else, they were certainly not acknowledgements by the underwriters of their liability, and hence would not avail the defendants. The situation is anomalous, since we have here an admittedly fictitious "loan" for a consideration, repayable only on condition that the borrower be otherwise reimbursed.[16] But even if it is admitted that such a transaction is a legal impossibility, and the "loan" is a payment or adjustment, the same result would follow.[17] The decision is clearly right; it is mainly interesting

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[11]Monmouth etc. Fire Ins. Co. *v.* Hutchinson etc. R. R. (1870) 21 N. J. Eq. 107.

[12]Platt *v.* Richmond etc. R. R. (1888) 108 N. Y. 358, 15 N. E. 393; Rintoul *v.* New York Cent. R. R. (C. C. 1883) 17 Fed. 905; Phœnix Ins. Co. *v.* Erie etc. Transp. Co. (1886) 117 U. S. 312, 6 Sup. Ct. 750.

[13]See note 12, *supra*; *cf.* Wilson *v.* Dawson (1876) 52 Ind. 513.

[14]Such a clause is valid, not unfair to the shipper or insurer, nor an attempt by the carrier to absolve himself from liability for his negligence. Phœnix Ins. Co. *v.* Erie etc. Transp. Co., *supra*. If, however, an insurer were merely a guarantor (see note 7, *supra*) such a clause would avoid the policy, because the release of the principal discharges the surety.

[15]In the absence of further provisions, the violation of such a clause in the policy leaves the shipper without recourse against the underwriter. Carstairs *v.* Mechanics' etc. Ins. Co. (C. C. 1883) 18 Fed. 473.

[16]In Roos *v.* Philadelphia etc. R. R. (1901) 199 Pa. 378, 49 Atl. 344, the court allowed the jury to find that the alleged "loan" was an adjustment. That case is criticised in Pennsylvania R. R. *v.* Burr (2 C. C. A. 1904) 130 Fed. 847. Other decisions in accord with the principal case are Bradley *v.* Lehigh Valley R. R. (2 C. C. A. 1907) 153 Fed. 350; Kalle & Co. *v.* Morton (1913) 156 App. Div. 522, 141 N. Y. Supp. 374, aff'd. 216 N. Y. 655, 110 N. E. 1043.

[17]Inman *v.* South Carolina Ry. (1889) 129 U. S. 128, 9 Sup. Ct. 249; on the ground that the policy of insurance having become void, the insurance company could make a conditional payment. See Kalle & Co. *v.* Mor-

as one of those cases where a court feels it necessary to abet legal peculiarities in order to accomplish what it considers substantial justice.

EFFECT OF CHARTER ON LIMITATION OF SHIPOWNER'S LIABILITY.—According to the civil law, the owners of a ship were responsible and liable for all the obligations of the master, whether arising *ex contractu* or *ex delicto*, without limitation, and the common law follows the civil law in this respect.[1] But according to the general maritime law, originating in the maritime usages in the Middle Ages, particularly in the Mediterranean, this liability was limited to the value of the vessel, and the owner might escape it by abandoning his ship or his interest in favor of the creditor or party injured.[2] But while this is the general maritime law, it is only so far operative in any country as it has been adopted by the laws and usages of that country.[3] In the United States, Congress has passed acts adopting a rule practically the same as the general marine law to encourage shipping and the investment of capital in that business, so that in the courts of this country a shipowner may proceed to limit his liability for loss or damage incurred without his privity or knowledge to the value of his interest in the vessel and her freight then pending.[4]

Though statutes passed in Massachusetts and Maine in 1818 and 1821 and the first Act of Congress in 1851 limited the liability of shipowners to some extent, the present system cannot be said to have been

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ton, *supra*. Since the liability of a carrier is independent of negligence, there seems even less reason for applying the doctrine of subrogation than in the other cases we have considered. See Home Ins. Co. *v.* Atchison etc. R. R. (1893) 19 Colo. 46, 55, 34 Pac. 281.

[1]See The Rebecca (U. S. D. C. 1831) 1 Ware *188; Levinson *v.* Oceanic Steam Nav. Co. (C. C. 1876) 15 Fed. Cas. No. 8292, noted in 17 Alb. L. J. 285.

[2]Consolato del Mare, c. 33; Ordonnance de la Marine of Louis XIV, Bk. 4, Tit. 4, Art. 4; Grotius, De Jure Pace et Belli, Bk. 2, c. 11, § 13; Maritime Code of Charles II (Sweden) part 1, c. 16; Emerigon, Contrats à la Grosse, c. 4, § 11.

[3]The Scotland (1881) 105 U. S. 24, 28. Some of the principles have been adopted and extended in England in 7 Geo. II, c. 15 (1734); 26 Geo. III, c. 86 (1786); 53 Geo. III, c. 159 (1813); 17 and 18 Vict. c. 104 (1854); 24 and 25 Vict. c. 10 (1862); 57 and 58 Vict. c. 60 (1894).

[4]Act of March 3rd, 1851, c. 46, and Act of June 26th, 1884, c. 121, to be found in U. S. Comp. Stat. (1913) §§ 8021-8028; see 9 Columbia Law Rev. 77. The rules of England and the United States are often very different, because England has not adopted the marine law in full. Thus the English courts have held that in case of a collision the owner's liability is limited to the value of the ship and the freight pending immediately before the collision, Brown *v.* Wilkinson (1846) 15 M. & W. *391, while the American rule is that the limit is the value of the vessel after the accident and at the end of the voyage. Norwich Co. *v.* Wright (1871) 80 U. S. 104. Where the ship is lost at sea, the voyage is terminated for the purpose of fixing the owner's liability when the ship has sunk and is lying at the bottom of the sea. Her value at that time is the limit of the owner's liability, and no freight except what is earned is to be estimated in fixing the amount of his liability. The City of Norwich (1886) 118 U. S. 468, 492, 6 Sup. Ct. 1150.